

TESTIMONY FROM JAMES MACPHEE, KALAMAZOO COUNTY STATE BANK

REGARDING HB 4484

APRIL 27<sup>TH</sup>, 2005

THE HISTORY OF MANUFACTURED HOME FINANCING HAS BEEN THAT IF THE HOME IS ON WHEELS, OR IS IN A PARK, OR IS NOT PERMANENTLY ATTACHED TO REAL ESTATE, THAT THE TITLE WAS THE WAY TO PERFECT THE LIEN IN THE SAME WAY THAT A CAR TITLE IS PERFECTED AT THE SECRETARY OF STATES OFFICE.

IF THE HOME WAS PERMANENTLY ATTACHED TO REAL ESTATE, PLACED ON A FOUNDATION, AND "AFFIXED" THEN A MORTGAGE FILED IN THE REAL ESTATE MORTGAGE INDEX WITH THE REGISTER OF DEEDS WAS THE CORRECT WAY TO PERFECT THE LIEN.

ALL THAT CHANGED ON JANUARY 14, 2003 IN THE US APPEALS COURT THAT STATED THAT MORTGAGES WERE NOT EFFECTIVE IN CREATING PERFECTED LIENS IN MOBILE HOMES.

YOU, THE MICHIGAN LEGISLATURE AND THE GOVERNOR RESPONDED TO THE "KROSKIE" CASE AND ENACTED 2003 PA 44 WHICH AMENDED THE MICHIGAN MOBILE HOME COMMISSION ACT AND EXPRESSLY AUTHORIZES REAL ESTATE MORTGAGE TO SECURE MOBILE HOMES THAT ARE PERMANENTLY ATTACHED TO REAL ESTATE OWNED BY THE BORROWER.

THE FEDERAL BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN UNDER JUDGE STEPHENSON ISSUED A DECISION HOLDING THAT MICHIGAN'S NEW MOBILE HOME LENDING RULES DO NOT APPLY RETROACTIVELY. THIS RULING HAS THROWN HOME OWNERS AND FINANCIAL INSTITUTIONS WHO FINANCE MODULAR AND MOBILE HOMES INTO A STATE OF TURMOIL.

EXAMPLE:

IN NOVEMBER OF 2000, KALAMAZOO COUNTY STATE BANK IN SCHOOLCRAFT MICHIGAN, A STATE CHARTERED BANK OPERATING SINCE 1908, AND BEING A FINANCER OF THOUSANDS OF HOMES INCLUDING MOBILE HOMES AND MODULAR HOMES IN SOUTH WEST MICHIGAN MADE A HOME MORTGAGE THAT WAS CLOSED WITH THE CUSTOMER ON DECEMBER 19, 2000.

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MOBILE HOME BILL

THE MORTGAGE WAS TO PURCHASE A HOME (WHICH AT THE TIME WAS 12 YEARS OLD), AND INCLUDED A FULL WALKOUT BASEMENT AND A DECK OFF THE BACK OF THE HOME AND WAS ON 20 ACRES THAT HAPPENED TO BE ADJACENT TO THE PROPERTY THAT THEY ALREADY OWNED AND WERE BUYING ON A LAND CONTRACT.

OUR LOAN COMBINED THE TWO PARCELS AND PURCHASED THE HOME. THE CUSTOMER HAD NOT MISSED ANY PAYMENTS.

IN APRIL OF 2003 THE CUSTOMERS APPLIED TO REFINANCE THE HOME AND LAND TO REDUCE THEIR RATE DURING THE REFI-BOOM AND TO TAKE SOME EQUITY OUT AT THAT TIME AS WELL FOR A TOTAL LOAN OF \$183,000. THAT LOAN WAS APPROVED ON JUNE 2, 2003 AND A NEW MORTGAGE WAS DONE. ALL PAYMENTS HAVE BEEN MADE SATISFACTORILY.

OUR CUSTOMERS WERE THE SECOND OWNERS OF THE HOME, AND AFTER PURCHASE, USED THE EQUITY OUT TO PUT ON A NEW ROOF AND SIDING. (SEE PICTURES OF APPRAISAL).

THE CUSTOMERS THEN RAN INTO FINANCIAL DIFFICULTY, AND IN MARCH OF 2004 HAD TO DECLARE BANKRUPTCY. SUBSEQUENTLY ~~THE~~ JUDGE IN BANKRUPTCY DETERMINED THAT OUR LIEN AS TO THE HOME WAS INVALID BUT WAS VALID ON THE REAL ESTATE ITSELF.

*Trustee*  
THE ~~ATTORNEY~~ FOR THE BANKRUPT AND THE TRUSTEES ATTORNEY ARE NOW MAKING DEMANDS ON THE BANK TO PAY THEM \$15,000 FOR THE HOME THAT IS ATTACHED TO THE REAL ESTATE THAT OUR CUSTOMERS HAVE BEEN PAYING ON FOR FOUR AND A HALF YEARS. (SEE ATTORNEY TALSMAN'S LETTER). OUR CUSTOMERS WISH TO KEEP THEIR HOME AND HAVE NOT MISSED A PAYMENT. THEIR ATTORNEY AGREED ORIGINALLY TO A REAFFIRMATION AND IT WAS SUBMITTED TO US AND AGREED UPON AND THEN SUBSEQUENT TO THE JUDGES RULING WAS WITHDRAWN.

THE TRAVESTY IS THAT THE CUSTOMER NOW WILL PAY ADDITIONAL AMOUNTS FOR THEIR HOME, AND THE TRUSTEE WILL RECEIVE \$15,000 DUE TO ONE JUDGES INTERPRETATION OF THE REGULATION WHICH YOU PASSED TO PREVENT SUCH A MISUNDERSTANDING.

JAMES D. MACPHEE  
CEO  
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Sunday, July 4, 2004

Kalamazoo County State Bank  
223 North Grand Street  
P. O. Box 668  
Schoolcraft, MI 49087

Re: Chapter 7 Bankruptcy [REDACTED]  
[REDACTED]

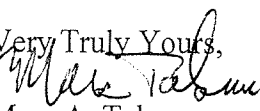
Dear Sirs:

This is in regard to the reaffirmation agreement, prepared by your office, signed by Mr. [REDACTED] and myself, and filed with the Bankruptcy Court on May 14, 2004.

Please be advised we have been contacted by the Chapter 7 Trustee, and have been informed that he has determined that your lien is defective as to the home which stands upon the land. The Trustee does not appear to have a problem with your actual mortgage against the land, but has taken the position that the lien against the home itself is defective. He also informs us that he intends to seek an Order of the Bankruptcy Court, invalidating your lien as it applies to the home. Finally, the Trustee suggests that he will offer to Mr. [REDACTED] the opportunity to buy the manufactured home from him once the Court has invalidated the lien.

Mr. [REDACTED] wishes to keep his home, and to keep his account with your bank current. But if the Trustee succeeds in his approach, Mr. [REDACTED] will not be able to pay your and to pay the Trustee as well. Thus, it is with regret that we need to inform you of Mr. [REDACTED] election to rescind the reaffirmation agreement filed on May 14. Until there is some resolution of the Trustee's claims, Mr. [REDACTED] will plan to continue to make his loan payments on time. And if the Trustee does not prevail, we hope that Mr. [REDACTED] relationship with the bank will continue as it has in the past - but at this time we need to have the actual reaffirmation agreement cancelled.

Naturally, if you have any questions you should feel free to contact me.

Very Truly Yours,  
  
Marc A. Talsma

MT/mt  
enclosure

Compliance/  
Loans/  
Mortgages

**BANKRUPTCY COURT INVALIDATES THE  
PERFECTED STATUS OF MOBILE HOME MORTGAGE**

As we reported in News 03-03 (3/20/03), p 13 and 03-06 (7/24/03), p 2, Michigan's laws dealing with perfecting liens against mobile homes that are permanently attached to real estate have changed greatly.

First, on January 14, 2003, the United States Sixth Circuit Court of Appeals issued an opinion that real estate mortgages were not effective to create perfected liens in mobile homes under Michigan law in effect as of that date. *In re Kroskie*, 315 F3d 644 (6th Cir, 2003). We discussed the background and effect of this decision in News 03-03, p 13. As a result of the *Kroskie* decision, Freddie Mac temporarily stopped purchasing real estate mortgages secured by real estate on which mobile homes were located.

The Michigan legislature and Governor Granholm responded to the *Kroskie* case by enacting 2003 PA 44, which amended the Michigan Mobile Home Commission Act (the "Amendment") effective July 14, 2003. The Amendment expressly authorizes real estate mortgages to secure mobile homes that are permanently attached to real estate owned by the borrower. We discussed the provisions of the Amendment in the News 03-06, p 2.

What about mobile home mortgages given before the date of the Amendment? Are they validly perfected? In other words, does the Amendment apply retroactively?

We discussed the issue of existing mortgages in the News 03-06, p 2. We noted that, while the answer was not altogether clear, the Amendment contains a "savings" provision intended to benefit lenders who took mortgages prior to the effective date of the Amendment. MCL 125.2330i(6), provides that:

"If a mobile home is affixed to real property before the effective date of the amendatory act that added this section, a person who is the holder of a lien or security interest in both the mobile home and the real property to which it is affixed on the effective date of the amendatory act that added this section may enforce its liens or security interests by accepting a deed in lieu of foreclosure or in the manner provided by law for enforcing liens on the real property."

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Apparently, this section is intended to protect mortgages taken before the effective date of the Amendment from arguments that they are not perfected under the holding of the federal court in the *Kroskie* case cited at the beginning of this article. However, the section did not attempt to establish priorities between a lender who perfected its mobile home lien only by taking a mortgage and one who perfected only by having its lien inserted into the certificate of title. We recognized in News 03-06 that this could create a troublesome issue if there are competing security interests and mortgage liens against the same mobile home.

One other provision in the Amendment also seems to apply to this question. \* At the last minute, the House of Representatives added an unusual "intent" provision to the bill that became the Amendment:

"Enacting section 1. It is the intent of this legislature that a security interest or lien on a mobile home affixed to real property may be perfected in the manner provided under law for perfecting a lien on real property, and not exclusively by a notation of the security interest or lien on the certificate of title."

In our view, this section went beyond the other provisions of the Amendment and seemed to revive the law as it existed before the *Kroskie* case was decided. It seems that this section was intended to give lenders a basis for arguing that they can perfect mortgage liens against mobile homes attached to land even if the certificates of title to the mobile homes have not been canceled.

\* The first court to deal with this issue has now held otherwise. The federal Bankruptcy Court for the Western District of Michigan has issued a decision holding that Michigan's new mobile home lending rules do **not** apply retroactively. *In re Oswalt, et al*, US Bankruptcy Court, Western District of Michigan, Case No. SK-03-04788 (April 19, 2004).

\* In this bankruptcy case, Daniel and Michelle Oswalt owned a mobile home affixed to real property in Constantine, Michigan. They gave CitiCorp Trust Bank ("CitiCorp") a real estate mortgage secured by the mobile home and the real property to which it was attached. That mortgage was recorded on December 19, 2001. On April 11, 2003, the Oswalts filed for Chapter 7 Bankruptcy and the bankruptcy trustee filed an adversary proceeding against Citicorp on September 11, 2003 to avoid Citicorp's mortgage on the grounds that it was not a properly perfected lien under *In re Kroskie*, 315 F3d 644 (6<sup>th</sup> Cir 2003).

\* In the *Oswalt* case, Citicorp argued that the Amendment was a clarification of the Michigan Legislature's intent and not just a new statute. The decision held that the Amendment was an entirely new statute and that it did not apply retroactively to existing mortgages. In other words, a mobile home mortgage recorded before July 14, 2003, the effective date of the \*

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